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Basic Free Exercise Clause Analysis

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BASIC FREE EXERCISE CLAUSE ANALYSIS

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I. INTRODUCTION

The free exercise clause[1] has been under attack in recent years. Under the guardianship of the Burger and Rehnquist Courts, the scope of the constitutional freedom of religion has been shrinking. But the clause is still on the books, and courts continue to hold government action unconstitutional from time to time because it encroaches too far on the free exercise of religion.

How does the free exercise clause work? This article describes the basic structure of free exercise analysis. The purpose is to help law students, lawyers, and judges understand and apply the diverse strands of Supreme Court analysis in this interesting and important field of constitutional law.

The legal analysis developed by the Supreme Court in its effort to enforce the free exercise clause is summarized in the following outline:

Free Exercise Clause; Basic Analysis

I. Preliminary questions
   - A. Does the court have jurisdiction?
   - B. Is the claim justiciable?
   - C. Was the harm caused by government action?

II. On the merits
   - A. Applicability: Did the government substantially burden claimant for believing or doing something prohibited by claimant's religion or for refraining from believing or doing something compelled by claimant's religion?
     1. Religion?

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1. U.S. CONST. amend. I. The clause provides, "Congress shall make no law . . . prohibiting the free exercise thereof [of religion]." The clause is applicable not only to Congress, but also to other branches of the federal government and, because it protects a fundamental right, to the branches of state and local government as well. Cantwell v. Connecticut, 310 U.S. 296 (1940).

2. Substantial burden?

B. Compliance: Can the government satisfy the rules developed by the Supreme Court for enforcing the clause?
   1. Burden based on religious belief: absolute ban
   2. Burden based on religious conduct
      a. General rule: stirct scrutiny (presumption of unconstitutionality; government has burden of proof)
         1) Does the government action further a compelling interest?
            a) Compelling interest?
               (1) Actual interest?
               (2) Permissible interest?
               (3) Very strong interest?
            b) Substantially effective means?
         2) Is the government action necessary?
      b. Exceptions: rationality review (presumption of constitutionality; claimant has burden of proof)
         1) Applicability
            a) Military context? or
            b) Prison context? or
            c) Other context where judicial deference is needed?
         2) Compliance
            a) Legitimate interest?
            b) Rational means?

III. Remedies

Let us translate this outline into prose. A claimant seeking redress for an alleged violation of the free exercise clause must initially meet three preliminary requirements.[2] First, the court must have jurisdiction over the claim. Second, the claim must be justiciable. Third, the conduct giving rise to the claim must be government action. Failure to satisfy any of these requirements normally results in dismissal without reaching the merits of the free exercise claim.

If claimant satisfies the preliminary requirements, the court will proceed to the merits of the claim. On the merits, the analysis has two components.[3] First, one must determine whether the free exer-

2. These are standard preliminary requirements that apply throughout constitutional law.

3. The two-part structure of the analysis is the same for all constitutional limits. *See*

cise clause is applicable, that is, whether the government has imposed a substantial burden or denied a substantial benefit because claimant believed or did something required by his or her religion or refused to believe or do something prohibited by his or her religion.

If the free exercise clause is found to be applicable, one must determine whether the government complied with the rules developed by the Supreme Court for enforcing the clause. Initially, the rules break down into two categories. First, the clause absolutely bans government action which disadvantages claimant because of religious belief.[4] Second, government action that disadvantages claimant because of religiously motivated conduct is subject to a more complex set of rules. In most cases, strict scrutiny applies, and the government action is unconstitutional unless the government proves that its action is necessary to further a compelling interest.[5] If the challenged government action is by military or prison authorities, in contrast, rationality review is applicable, and claimant must prove that the action is not a rational means to further any legitimate government interest.[6]

If the free exercise clause is inapplicable or its requirements are met, the analysis ends. If, on the other hand, the clause is applicable and its requirements are not met, one must proceed to the question of remedies.[7] The next section discusses each step of basic free exercise clause analysis in more detail.

II. Discussion

A. *Preliminary questions*

Before reaching the merits, a free exercise clause claimant must satisfy the three standard preliminary requirements that apply throughout constitutional law, that is, that the government harmed claimant enough to create a justiciable claim that is within the jurisdiction of the court.

Galloway, *Basic Constitutional Analysis*, 28 Santa Clara L. Rev. 775 (1988). In applying any constitutional restriction on government action, one should ask first whether the limit is applicable—that is, is this the kind of government action that is subject to this limit? — and second whether the government complied with the rules the Supreme Court has developed for enforcing the limit. In short, the analysis on the merits of any constitutional limit focuses on two questions: 1) applicability and 2) compliance.

4. *See infra* notes 26-35 and accompanying text.
5. *See infra* notes 39-54 and accompanying text.
6. *See infra* notes 55-59 and accompanying text.
7. *See infra* p. 878.

1. *Does the court have jurisdiction?*

First, claimant must show that the court has jurisdiction over the claim. Jurisdiction is normally a statutory rather than a constitutional issue, and thus is beyond the scope of this article.[8] The jurisdiction requirement sometimes raises issues in free exercise clause cases. This article will assume that jurisdiction is present in all relevant cases.

2. *Is the claim justiciable?*

Next, to qualify for a decision on the merits, free exercise claims must involve a justiciable controversy between adverse parties. Justiciability problems surface repeatedly in free exercise clause cases. Recently, for example, the Court devoted two pages of its opinion in a major free exercise case to the issue whether the rule of necessity barred reaching the merits of the claim.[9] Similarly, the claim may be unripe or moot, or claimant may not have standing. This article will not analyze these justiciability issues.

3. *Was the harm caused by government action?*

Finally, the free exercise clause, like most other constitutional limits, applies only to the government. If the challenged action was by a *government official*, the government action requirement is met unless the conduct was unrelated to the official's government duties. If the challenged action was by a *private person or entity*, the government action requirement is not met unless the government either compelled the action or encouraged it so substantially that the action must be attributed to the government.[10]

If claimant does not satisfy the three preliminary requirements,

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8. In one of the Supreme Court's most recent free exercise cases. Frasee v. Illinois Dept. of Employment Sec., 109 S. Ct. 1514 (1989), jurisdiction was based on 28 U.S.C. § 1257(2) (1982).

9. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319, 1323-24 (1988).

10. *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991, 1004 (1982):

> [C]onstitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which plaintiff complains. . . . [A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.

A symbiotic relationship between the government and the private party in which the government profits from the private conduct may also satisfy the government action requirement, although the status of this rule is in doubt. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

the claim should be dismissed without reaching the merits of the free exercise clause issues. If claimant satisfies the preliminary requirements, one may proceed to evaluate the free exercise claim on the merits.

B. *On the merits: Was the free exercise clause violated?*

Analysis of free exercise claims on the merits involves the same two-step inquiry that applies to all constitutional limits. One must determine first whether the free exercise clause is applicable, that is, whether the government action that harmed claimant was the kind of government action that is subject to the clause. If the clause is applicable, one must determine second whether the government has complied with applicable free exercise clause requirements.

1. *Applicability: Did the government impose a burden or deny a benefit based on religiously motivated belief or conduct?*

The free exercise clause applies only to government conduct that disadvantages claimant because of religiously motivated belief or conduct by claimant. To determine whether the clause is applicable, one must ask first whether the belief or conduct giving rise to the government action is religious and second whether the disadvantage imposed on claimant is the kind that is subject to the clause.

a. *Religion*

The free exercise clause applies only when the government disadvantages claimant because of some religiously motivated belief or action on the part of claimant.[11] Surprisingly, however, the Supreme Court has never formulated an explicit definition of "religion."[12] Traditionally, the core concept is that religion concerns belief in God, that is, "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation."[13] Modern cases suggest that non-theistic beliefs may also qualify as religious if they are the functional equivalent of belief in God. As the Court put

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11. "There is no doubt that '[o]nly beliefs rooted in religion are protected by the Free Exercise Clause,'. . . ." *Frasee*, 109 S. Ct. at 1517 (citations omitted). The belief may be entirely individual; it need not be endorsed by a religious organization. *Id.*

12. "A fundamental problem runs throughout the field of freedom of religion: what *is* a religion? The Court has not directly answered this question." J. BARRON & C. DIENES, CONSTITUTIONAL LAW IN A NUTSHELL 341 (1986).

13. Universal Military Training and Service Act of 1948, 50 U.S.C. App. § 456(j) (1958).

it in *United States v. Seeger*,[14] the test "is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God . . ."[15] If religious belief or conduct is involved, the claim may proceed to the next level of analysis.

b. *Cognizable burden or denial of benefit*

The free exercise clause applies to government action that substantially burdens the exercise of religion.[16] Moreover, it protects individuals from *indirect* as well as direct burdens.[17] However, it does not apply to all forms of government action that interfere with the exercise of religion. In *Lyng v. Northwest Indian Cemetery Protective Association*,[18] for example, the Court held that building a road through National Forest land does not trigger free exercise scrutiny even though the land is highly sacred to several Indian tribes and the road "will have severe adverse effects on the practice of their religion."[19]

Lyng makes clear that the severity of the burden is not always controlling and that the form of the burden may determine whether the clause applies. Stressing that the clause applies only to government action that "prohibits" the free exercise of religion,[20] the *Lyng* majority indicated that government interference with religion triggers free exercise scrutiny only if it has a "tendency to coerce individuals into acting contrary to their religious beliefs."[21]

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14. 380 U.S. 163 (1965).

15. *Id.* at 166. Although this test concerns the meaning of a federal draft statute rather than the Constitution, it is widely understood as applicable to the free exercise clause as well.

16. *E.g.*, Hernandez v. Comm'r, 109 S. Ct. 2136, 2148 (1989) ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice . . . ."). Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985), for example, the Court held that federal wage and hour requirements do not impose enough of a burden to trigger free exercise analysis, because employees who have religious objections to receiving wages can simply give them back to the employer. *Id.* at 303-04.

17. *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707, 717-18 (1981) ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."); Sherbert v. Verner, 374 U.S. 398 (1963).

18. 108 S. Ct. 1319 (1988).

19. *Id.* at 1324.

20. "The crucial word in the constitutional text is 'prohibit'. . . ." *Id.* at 1326.

21.

> This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forth a compelling justification for its otherwise lawful actions.

Lyng suggests that the only government burdens on religion that require free exercise analysis are those that 1) penalize belief or conduct *prescribed* by religion or 2) require belief or conduct *proscribed* by religion. In explaining why, despite claimants' sincere religious objections, building a road through sacred land and using social security numbers to identify individuals do not burden the exercise of religion in a manner cognizable under the free exercise clause, the Court stated, "In neither case, however, would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."[22]

Moreover, even in cases where the government punishes a person for conduct required by religion, the burden does not trigger free exercise scrutiny if the conduct is validly prohibited by statute. As the Court put it in *Employment Division v. Smith*,[23] "The protection that the First Amendment provides to '*legitimate* claims to the free exercise of religion,' . . . does not extend to conduct that a State has validly proscribed."[24] Thus, denial of unemployment compensation to drug counsellors fired for ingesting the hallucinogenic drug peyote as part of a religious ceremony would not be a burden requiring free-exercise scrutiny if that conduct violates a statute and the statute *itself* does not violate the free exercise clause.

If the government action that harmed claimant is not a cognizable burden on the exercise of religion, the free exercise clause does not apply and the analysis ends. If, on the other hand, the challenged government action is the kind of burden on religion that triggers free exercise scrutiny, the analysis proceeds to the question of compliance.

2. *Compliance: Is the government action supported by a sufficient justification to withstand free exercise scrutiny?*

Free exercise cases draw a distinction between government coercion of religious belief and government coercion of religious conduct. The former is absolutely banned; the latter may be constitutional if the government has a sufficient justification to satisfy the applicable

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Id. Cf. Tilton v. Richardson, 403 U.S. 672, 689 (1971) ("coercion directed at the practice or exercise of their religious beliefs").

22. *Lyng*, 108 S. Ct. at 1325. *Cf.* Bowen v. Roy, 476 U.S. 693 (1986) (federal requirement that State use Social Security numbers in administering welfare programs is not the kind of burden that triggers free exercise scrutiny).

23. 108 S. Ct. 1444 (1988).

24. *Id.* at 1451.

level of means-end scrutiny.[25] The next two sections discuss these two strands of free exercise law.

a. *Regulation of religious beliefs*

Beginning with *Reynolds v. United States*,[26] the Supreme Court has repeatedly held that government conduct regulating, coercing, or burdening religious beliefs is absolutely banned. As Chief Justice Waite put it in *Reynolds*, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions . . . ."[27]

Classic restatements of this rule include the following. In *Cantwell v. Connecticut*,[28] Justice Roberts stated that the free exercise clause "embraces two concepts, freedom to believe and freedom to act. The first is absolute, but in the nature of things the second cannot be."[29] In *Braunfeld v. Brown*,[30] Chief Justice Warren wrote, "The freedom to hold religious beliefs and opinions is absolute."[31] Justice Brennan's landmark opinion in *Sherbert v. Verner*[32] stated, "The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such . . ."[33] In *Employment Division v. Smith*,[34] Justice Stevens' opinion referred again to "[t]he distinction between the absolute constitutional protection against governmental regulation of religious beliefs on the one hand, and the qualified protection against the regulation of religiously motivated conduct . . . ."[35]

The point is so well-settled as to merit the label black-letter law. Although absolute bans are rare in constitutional law, this is one.

b. *Coercion of religious conduct*

As the foregoing quotes make clear, government regulation of religiously motivated conduct is *not* absolutely banned. Instead, the Supreme Court has decided that government coercion of religious

25. *See infra* note 36 for an explanation of means-end scrutiny.

26. 98 U.S. 145 (1878). *Reynolds* was "the first major 'free exercise' case." G. GUNTHER, CONSTITUTIONAL LAW 1510 (11th ed. 1985).

27. *Reynolds*, 98 U.S. at 164.

28. 310 U.S. 296 (1940).

29. *Id.* at 303-04.

30. 366 U.S. 599 (1961).

31. *Id.* at 603.

32. 374 U.S. 398 (1963).

33. *Id.* at 402 (emphasis in original).

34. 108 S. Ct. 1444 (1988).

35. *Id.* at 1450 n.13.

conduct is unconstitutional unless the justification for the coercion is sufficient to satisfy the applicable level of means-end scrutiny.[36]

The Supreme Court has adopted two versions of means-end scrutiny as the tests for determining whether the government's justification satisfies the free exercise clause. As a general rule, the strict scrutiny test is applied and government burdens on religious conduct are unconstitutional unless the government can satisfy this test.[37] However, there are two situations which constitute exceptions to this general rule. In instances where the burden is imposed by military authorities on military personnel or by prison authorities on prisoners, the government only needs to survive rationality review.[38] The next two sections will discuss the lines of cases which apply these two tests.

1) *Strict scrutiny: the general rule*

In the vast majority of cases, government burdens on the exercise of religion are subject to a strong presumption of unconstitutionality and violate the free exercise clause unless the government can satisfy strict scrutiny by proving that the burdens are necessary to further a compelling interest.[39] The structure of the analysis here is identical to that used in strict scrutiny cases involving the due process, equal protection, and free speech clauses.[40] Strict scrutiny has two prongs, the first of which has two components. The government must first prove that its conduct furthers a compelling interest, that is, that the conduct was undertaken for a purpose that is compelling

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36. *See* Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 LOY. L.A.L. REV. 449 (1988) ("Means-end scrutiny is an analytical process involving examination of the purposes (ends) which conduct is designed to serve and the methods (means) chosen to further those purposes.").

37. Generally speaking, strict scrutiny is the most exacting level of means-end scrutiny.

38. Rationality review, in contrast to strict scrutiny, is the least intense level of means-end scrutiny.

39. The leading case on this point is Sherbert v. Verner, 374 U.S. 398 (1963). Early cases suggested that, while government restrictions on religious beliefs are absolutely prohibited, the government has virtually unlimited power to restrict religiously motivated conduct. *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878). In *Sherbert*, the Court jumped nearly to the opposite extreme, imposing strict limits on the government's ability to coerce conduct contrary to religious beliefs. The *Sherbert* strict-scrutiny test has been reinforced in numerous later cases. *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Bob Jones Univ. v. United States, 461 U.S. 574 (1983); United States v. Lee, 455 U.S. 252 (1982); Thomas v. Review Bd., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972). As the Court explained in *Hobbie*, 480 U.S. at 141, "Both *Sherbert* and *Thomas* held that such infringements must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest."

40. *See* Galloway, *supra* note 36, at 453-55.

(very important) and that the conduct comprises a substantially effective method for furthering that interest. Secondly, the government must prove that the conduct was necessary, that is, the government action was the least onerous alternative available for furthering the interest.

a) *Did the conduct further a compelling interest?*

(1) *Compelling interest*

To satisfy strict scrutiny, the government must prove that the conduct imposing a burden on the free exercise of religion was undertaken to further a compelling purpose. To satisfy this requirement, the government must show that its purpose was both constitutionally permissible and very strong. In addition, the purpose relied upon must have been the government's actual purpose rather than a hypothetical purpose dreamed up after the fact by a government attorney or judge.

Strict scrutiny involves a stringent version of end-scrutiny that often results in invalidation of the challenged conduct. For instance, the Court has held that preventing fraudulent unemployment claims is not a compelling interest.[41] Similarly, it has held that the interests in minimizing burdens on unemployment insurance funds and preventing government inquiries into religious beliefs are not compelling.[42]

More interesting, however, are the cases holding that the government's interests are sufficiently compelling to satisfy strict scrutiny. The Court has found the following interests to be compelling: "maintaining a sound tax system,"[43] maintaining the solvency of the Social Security Trust Fund,[44] eradicating racial discrimination in schools,[45] providing manpower for the armed services,[46] and preserving a uniform day of rest.[47] These decisions suggest that the compelling interest test in free exercise cases may not be as strict as, for example, in equal protection cases involving racial classifications dis-

41. *See Sherbert*, 374 U.S. at 407.

42. *See Thomas*, 450 U.S. at 717.

43. *See* Hernandez v. Commissioner, 109 S. Ct. 2136, 2149 (1989).

44. *See* United States v. Lee, 455 U.S. 252 (1982).

45. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

46. *See* Johnson v. Robison, 415 U.S. 361 (1974); Gillette v. United States, 401 U.S. 437 (1971).

47. *See* Braunfeld v. Brown, 366 U.S. 599 (1961) (as interpreted by Justice Brennan's opinion for the Court in Sherbert v. Verner, 374 U.S. 398, 408-09 (1963)).

favoring minorities and in free speech cases involving prior restraints.

(2) *Substantially effective means*

The "compelling interest" prong of strict scrutiny requires not only that the government have a compelling interest, but also that the government's conduct "further" that interest, i.e., that the conduct be a substantially effective means for advancing that interest.[48]

This requirement, which is frequently buried in other strict scrutiny cases before the Supreme Court, has been very much in the forefront in free exercise cases. *Wisconsin v. Yoder*[49] is a good example. The question in that case was whether a mandatory school attendance law for children under sixteen violated the free exercise rights of Amish parents. Defending its compulsion of conduct proscribed by the Amish religion, the government invoked the interests in preparing individuals for participation in the political system and developing self-sufficient citizens. The Supreme Court assumed, *arguendo*, that the interests might be sufficiently strong to satisfy strict scrutiny, but held that the requirement of an additional year or two in school is not a substantially effective method for furthering the purposes. As the Court put it, the additional education would "do little to serve those interests."[50]

b) *Is the conduct necessary?*

To satisfy the final prong of strict scrutiny, the government must prove that the challenged burden on religion is necessary to further a compelling interest. In other words, imposing the burden on religion must be the "least onerous alternative" available for furthering the compelling interest. If another equally effective yet less onerous alternative is available, there is no compelling justification for imposing the burden, and the government should use the less onerous alternative to promote its compelling interest.

The necessity requirement has proved fatal to the government's argument in some cases. In *Sherbert v. Verner*,[51] for example, denial of unemployment benefits to an employee who was discharged for refusing to work on his Sabbath was held unconstitutional in part because the government had failed to disprove the availability of less

48. Galloway, *supra* note 36, at 450.
49. 406 U.S. 205 (1972).
50. *Id.* at 222.
51. 374 U.S. 398 (1963).

onerous alternatives for preventing fraud.[52]

The government is not required, however, to use less onerous alternatives that will not effectively promote its compelling interest. In *Braunfeld v. Brown*,[53] for example, the Court held that Sunday closing laws are constitutional, rejecting the less onerous alternative of allowing exemptions for religious objectors because that alternative would not be effective.[54] It is unsettled whether the government must use effective less onerous alternatives that it believes are not "equally effective."

2) *Rationality review: the exception*

In two recent cases,[55] the Court declared that government coercion of religious conduct in certain specific contexts is subject to rationality review rather than strict scrutiny. In analyzing these exceptions, one should ask first whether rationality review is applicable and second whether rationality review is satisfied.

a) *Is rationality review applicable?*

The two exceptions recognized so far involve military and prison contexts in which the Justices believe they should defer to choices made by other government officials. *Goldman v. Weinberger*[56] upheld an Air Force ban on wearing hats, holding that the application of the ban to a yarmulke did not violate the free exercise clause. Stressing that courts should defer to military judgments that are reasonable and even-handed, the Court applied rationality review rather than strict scrutiny.

O'Lone v. Estate of Shabazz[57] upheld a prison work regulation preventing Muslim prisoners from attending Jumu'ah, a noontime religious rite. Chief Justice Rehnquist's majority opinion explained, "To ensure that courts afford appropriate deference to prison officials, we have determined that prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged constitutional infringements of fundamental constitutional rights."[58] Applying ration-

52. *Id.* at 407.
53. 366 U.S. 599 (1961).
54. *Id.* at 608.
55. O'Lone v. Estate of Shabazz, 107 S. Ct. 2400 (1988); Goldman v. Weinberger, 475 U.S. 503 (1987).
56. 475 U.S. 503 (1987).
57. 107 S. Ct. 2400 (1988).
58. *Id.* at 2404.

ality review, the Court held that the work regulation is constitutional because it is reasonably related to achieving order and security and rehabilitating prisoners.

In short, rationality review is applicable in cases where religious coercion is imposed by military or prison officials. In the future, the Court may find other similar contexts where judicial deference is required and where rationality review should be used rather than strict scrutiny. One possible example would be mental hospitals, where the custodial setting may require deference similar to that accorded to prison officials. Once rationality review is found to apply, the next step in the analysis concerns whether rationality review is met.

b) *Is rationality review satisfied?*

Rationality review is a mild two-prong form of means-end scrutiny that requires claimant to prove that the government action is not a rational method for furthering any permissible government interest.[59] When this test is applicable, the government action is constitutional if it has any valid purpose and if the means chosen are rational. In such cases, a presumption of constitutionality applies, and the burden of proof is on claimant to show either that the government has no valid purpose or that the means chosen plainly will not further any such purpose. It is quite easy for the government to satisfy rationality review, so in most cases the burden on religion will not violate the free exercise clause in such contexts.

To summarize, if the free exercise clause is applicable because the government has imposed a cognizable burden on religious belief or conduct, one must characterize the burden and apply the appropriate test. If the burden is on religious belief, the government's conduct is absolutely banned. If the burden is on religious conduct, then strict scrutiny is applicable unless the burden is imposed by military, prison, or other similar officials and rationality review therefore applies.

If the free exercise clause is inapplicable or the government has satisfied the applicable tests developed by the Supreme Court for enforcing that limit, claimant loses on the merits, and the analysis ends. If, on the other hand, the preliminary requirements are met and claimant prevails on the merits by proving that the free exercise clause is applicable and the government did not comply with the

59. *See* Galloway, *supra* note 36, at 451-53.

clause's requirements, claimant wins on the merits, and the final issue is what remedies are in order.

C. *Remedies*

This article will not discuss issues concerning remedies in free exercise cases. Suffice it to say that courts have broad powers to enjoin government conduct that violates the clause and to award damages to claimants whose rights have been violated.

III. CONCLUSION

Basic free exercise analysis proceeds in three steps. First, the preliminary requirements (jurisdiction, justiciability, and government action) must be met. Second, the merits of the free exercise claim must be considered. One must determine whether the free exercise clause is applicable, that is, whether the government has imposed a burden or denied a benefit because of belief or conduct required by religion, or because of refusal to hold a belief or engage in conduct prohibited by religion. If so, one must determine whether the government has complied with the requirements of the free exercise clause. If the burden is on claimant's belief, government interference is absolutely prohibited and will automatically be deemed unconstitutional. If the burden is on claimant's conduct, one must determine whether strict scrutiny or rationality review is applicable and whether the applicable test is satisfied. If the free exercise clause is applicable and the government did not comply with its requirements, claimant wins on the merits, and questions concerning remedies must be addressed. Hopefully, this analytical model will help law students, lawyers, and judges conduct free exercise analyses in an orderly and accurate fashion.